IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Mr. Justice Richard J. Chartier

BETWEEN:

JACK ANTHONY KING	)	***A. L. Q. Chapman*** *on his own behalf*
(Plaintiff) Respondent	)	***W. S. Gange*** *and* ***K. B. Bomback***
- and -	)	*for the Respondent*
ALEXANDER LENARD QUACCOO CHAPMAN	)	*Appeal heard:* ***November 27, 2012***
(Defendant) Appellant	)	*Judgment delivered:* ***December 5, 2012***

CHARTIER J.A.

1 The plaintiff sued the defendant for the return of $25,000 previously paid to him pursuant to the terms of a confidential settlement agreement. The defendant filed a statement of defence. After several unsuccessful attempts to examine the defendant for discovery, the plaintiff moved and obtained a court order to compel the defendant's attendance at discovery. Again, the defendant failed to attend. Eventually, the statement of defence was struck and the defendant was noted in default. The plaintiff moved to have final judgment entered. The defendant did not attend that hearing. The motions judge granted final judgment.

2 The defendant appeals the decision of the motions judge on two grounds. First, the defendant argues that the motions judge erred when he

concluded that a confidential agreement between the parties had been breached. Second, he submits that the motions judge erred by giving effect to an unenforceable confidentiality agreement that "constituted a criminal act" and that is "contrary to public policy."

3 I will deal with the last issue first. The question of the unenforceability of the agreement is raised for the first time on appeal. Appellate courts will generally not entertain new issues on appeal unless leave is first obtained. As this court recently stated in *Harder v. Manitoba Public Insurance Corp.*, 2012 MBCA 101 (at para. 12):

> .... As Steel J.A. wrote in *Bates v. Welcher*, 2001 MBCA 33, 153 Man.R. (2d) 281 (at para. 32): "Normally, courts will not entertain new issues on appeal except under exceptional circumstances." See also *Kaiman Estate v. Graham Estate*, 2009 ONCA 77 at para. 18, 245 O.A.C. 130. The basis for this general rule is simple. Appellate courts review decisions to correct error. If an issue is not raised in the first instance, it is difficult for an appellant to argue that the decision-maker committed an error on that issue.

4 In deciding whether to grant leave to raise a new issue on appeal, appellate courts will consider the reason why the issue was not raised in first instance. In this case, it was not raised because the defendant failed to attend the hearing. The defendant explains his non-attendance by asserting that he had not been served with the notice of motion. The defendant's explanation is contrary to an unchallenged sworn affidavit stating that the defendant's counsel had been properly served. It is also contrary to a letter sent by defendant's counsel to plaintiff's counsel which was referenced in the reasons of the motions judge (at para. 11):

> As noted earlier, neither [the defendant] nor his counsel attended the hearing of this motion despite being notified. At the beginning of the hearing, [plaintiff]'s counsel filed a letter from [defendant]'s counsel stating that [the defendant] objected to him "making any attendances on his behalf in court or otherwise" and "I have informed [the defendant] of the Motion". ....

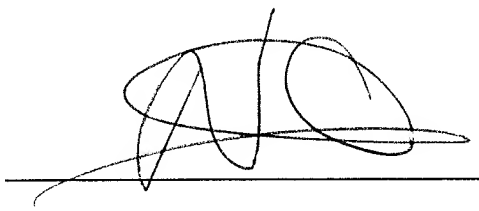
5 This motion related to final judgment. The plaintiff had already obtained default judgment. I note that pursuant to Queen's Bench Rule 19.02(4), a defendant who has been noted in default (such as the defendant in this case) is not entitled to notice and need not be served. Nonetheless, service was effected on counsel of record and an affidavit of service to that effect was filed before the motions judge. Until a court allows counsel of record to withdraw, service on counsel of record is proper service. In this case, while the defendant no longer wanted counsel to represent him on the matter, the fact remained that he was still counsel of record. Moreover, counsel for the defendant filed a letter indicating that he had informed the defendant of the motion. In the end, the defendant's explanation on service is, to put it mildly, absolutely unconvincing. As a result, there are no exceptional circumstances to justify the hearing of this new issue raised for the first time on appeal and I would not grant leave to consider it.

6 Furthermore, the plaintiff argues that the defendant is attempting to litigate this matter anew and that this ground is, in reality, a collateral attack upon a prior decision which was never appealed: *Chapman v. King*, 2010 MBQB 249, 259 Man.R. (2d) 185. While that appears to be the case, given that I would not grant leave to consider this new issue, it is not necessary to decide this ground.

7 I now turn to the ground relating to the motions judge's finding that the defendant breached the confidentiality agreement. In his reasons, the motions judge correctly stated the legal principles to be applied and clearly understood the factual issues arising from the affidavit evidence. He found that a breach had occurred. Key to his decision is that, pursuant to Queen's Bench Rule 19.02(1), a defendant who has been noted in default is deemed to admit the truth of the allegations of fact made in the statement of claim. Paragraphs 7 and 8 of the statement of claim set out the particulars of how the defendant breached the terms of the settlement agreement. By operation of Queen's Bench Rule 19.02(1), those particulars are now deemed to be true.

8 In the result, I am of the view that the defendant has not demonstrated any error in principle by the motions judge or any palpable and overriding error with respect to the facts and the evidence referred to in his analysis.

9 I would dismiss the appeal with costs.



J.A.

I agree: J.A.

I agree: J.A.